SUPREME COURT, U. S.

FILED

AUG 25 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 536

PRESTON CORPORATION, PRESTON PUBLIC SERVICE CORPORATION, and JANE GREER KELLY, *Petitioners*,

v.

RICHARD AUBREY RAESE, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

WILLIAM H. ARKIN
1001 Pennsylvania Building
Washington, D. C.
Attorney for Petitioners

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinions below	2
Jurisdiction	2
Question presented	2
Statutes and rule involved	4
Statement of case	7
Reasons for granting the writ	13
Conclusion	27
Appendix	1a

CITATIONS

CASES:

Bierman v. *Marcus*, 246 F.2d 200 (C.A. 3, 1958), certiorari denied, 356 U.S. 933 (1958) 17
Chicot County v. *Sherwood*, 148 U.S. 529, 534 (1893) 16
Commonwealth Trust Co. v. *Bradford*, 297 U.S. 613, 618-619 (1936) 16
Douglas-Guardian Warehouse Corporation v. *Ramy Seed Co.*, 271 F.2d 24 (C.A. 8, 1959) 22
Elliott v. *Federal Home Loan Bank Board*, 233 F. Supp. 578, 588 (SD Cal. 1964) 26
England v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, 415 (1964) 16, 21
First National Bank of Chicago v. *United Air Lines*, 190 F.2d 493 (C.A. 7, 1951), reversed on other grounds 342 U.S. 396 (1952) 25
Foman v. *Davis*, 371 U.S. 178, 181-182 (1962) 26
Hill v. *Upper Mississippi Towing Corp.*, 141 F. Supp. 692, 694 (DC Minn. 1956) 25
Kelly v. *Greer*, 334 F.2d 434 (C.A. 3, 1964), 365 F.2d 669 (C.A. 3, 1966), certiorari denied 385 U.S. 1035 (1967) 10, 15
Kelly v. *Greer*, 354 F.2d 209 (C.A. 5, 1965) 10
Kelly v. *Greer Steel Co.*, 309 F.2d 786 (C.A. 6, 1962) 15
Kline v. *Burke Construction Co.*, 260 U.S. 226 (1922) 16
Levinson v. *United States*, 258 U.S. 198, 200 (1921) .. 25

Page

Liberty Mutual Insurance Co. v. *Pennsylvania Railroad Co.*, 322 F.2d 963, 968 (C.A. 7, 1963) 16
Markham v. *Allen*, 326 U.S. 490 (1945) 16, 21
Maryland Casualty Co. v. *Glassell-Taylor & Robinson*, 156 F.2d 519, 525 (C.A. 5, 1946) 16
McClellan v. *Carland*, 217 U.S. 268, 282 (1910) 16
McGowan v. *Parish*, 237 U.S. 285, 295 (1914) 25
Merchants Heat & Light Co. v. *Clow & Sons*, 204 U.S. 286, 290 (1907) 24
Meredith v. *Winter Haven*, 320 U.S. 228, 234 (1943) .. 21
Metropolitan Life Ins. Co. v. *Segaritis*, 20 F. Supp. 739, 741 (ED Pa. 1937) 18
National Fire Ins. Co. v. *Sanders*, 38 F.2d 212, 214 (C.A. 5, 1930) 19
Preston County Coke Co. v. *Preston County Light and Power Co.*, 146 W.Va. 231, 119 S.E. 2d 420 (1961) 15
Provident Security Life Ins. Co. v. *Gorsuch*, 323 F.2d 839 (C.A. 9, 1963), certiorari denied 376 U.S. 950 (1964) 26
Railway Express Agency v. *Jones*, 106 F.2d 341, 344 (C.A. 7, 1939) 20
Roberts v. *Metropolitan Life Ins. Co.*, 94 F.2d 277, 280 (C.A. 7, 1938), certiorari denied 303 U.S. 660 (1938) 20
Sanders v. *Armour Fertilizer Works*, 292 U.S. 190, 198 (1934) 18
St. Louis Southwestern Railway Co. v. *Meyer*, 363 Mo. 1057, 272 S.W. 2d 249 (1954), appeal dismissed 349 U.S. 942 (1955) 18
Toledo v. *Toledo Ry. and Light Co.*, 259 Fed. 450 (C.A. 6, 1919) 18
Treinies v. *Sunshine Mining Co.*, 308 U.S. 66, 74 (1939) 16
United Benefit Life Insurance Co. v. *Katz*, 155 F. Supp. 391, 393 (ED Pa. 1957) 17
Wertheimer v. *Bank of Nova Scotia*, 140 F. Supp. 950, 953 (SD N.Y. 1956) 21

STATUTES AND RULE:

28 U.S.C. 1335 .....4, 7, 20
28 U.S.C. 1397 ..... 5, 7
28 U.S.C. 2361 .....5, 7, 10, 16, 24, 25
Rule 22(2), F.R.C.P. 6, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

PRESTON CORPORATION, PRESTON PUBLIC SERVICE CORPORATION, and JANE GREER KELLY, *Petitioners*,

v.

RICHARD AUBREY RAESE, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners[1] pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fourth Circuit, entered in the above matter on April 18, 1967 (R. 41, 92).

---

[1] The action below was commenced against both petitioner Jane Greer Kelly and respondent Richard Aubrey Raese individually and in their claimed capacities as fiduciaries and custodians of their minor children, Richard Greer Raese and John Reeves Raese and the children were also named as parties defendant in that action.

OPINIONS BELOW

The opinion of the District Court of the United States for the Northern District of West Virginia (I-151a)[2] is reported at 236 F. Supp. 135 and is printed in the Appendix hereto, *infra* p. 8a. The opinion of the Court of Appeals has not been reported and is printed in the Appendix hereto, *infra*, p. 1a.

JURISDICTION

The judgments of the Court of Appeals were entered on April 18, 1967 (R. 41, 92); pp. 6a, 7a *infra*. Rehearing was denied on May 30, 1967 (R. 56, 107); p. 8a *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. Sections 1254(1) and 1232.

QUESTIONS PRESENTED

The real question presented by this petition is whether a federal court should, after nearly seven years of almost continuous delay, be required to take jurisdiction of an interpleader suit brought to settle an even longer dispute over claimed adverse rights stemming from the dissolution of a marriage and hence to put an end to the maintenance of further vexatious and costly litigation between the adverse claimants.

Petitioners Preston Corporation ("Preston"), as interested stakeholder, and Preston Public Service Corporation ("Public Service"), the owner, pursuant to a reorganization of electric and telephone distribution facilities being operated in West Virginia, brought the action to resolve mutually exclusive claims to custody and control of substantial equity interests in the

[2] The references to the portions of the certified transcript of record contained in appendices filed by the petitioners and respondent in the Court of Appeals are respectively designated I... and II...

utility properties of the children of divorced parents alleged to have resulted from conflicting state court orders and decrees obtained by the parents.

The mother, Petitioner Jane Greer Kelly, who controls Preston, asserted her claim by answer to the complaint on the basis of orders entered by a Florida state court which granted her petition for divorce. The father, respondent Richard A. Raese, was not directed to nor did he file an answer to the complaint, but his claim to guardianship of the children may be evidenced by his allegations in an action he instituted in a West Virginia state court shortly before this interpleader suit was commenced.

Dismissal of the interpleader action by the district court following its transfer to the district of respondent's residence was principally predicated on the absence of a *bona fide* fear that the stakeholder would be subjected to vexatious claims from its controlling stockholder; yet the Court of Appeals acknowledged the presence of a clear dispute between the alleged adverse claimants. But it is patently evident that the court's decision was strongly influenced not only by the relationship between the adverse claimants but by its prejudgments of the merits of independent but related claims which were asserted against the respondent Raese personally for damages alleged to have been suffered by the petitioning corporations and by a demand for relief made by petitioner Mrs. Kelly's cross-claim—prejudgments made in the absence of the receipt by the trial court of any evidence in support of or in opposition to their claims.

The questions which should be considered are:

1. Whether the essential purpose of interpleader—the avoidance of vexatious litigation by the resolution of

adverse claims to a *res* which has been deposited in interpleader can be frustrated by a federal court as within its discretion to hear or dismiss;

2. Whether the refusal of a federal court to entertain an interpleader action in which jurisdictional requirements have been met and where there has been a history of incessant delays and the refusal to require adverse claimants to plead to a complaint in interpleader in substance denies due process to parties seeking to resolve such disputes; and

3. Whether independent but related claims asserted by the petitioners against the respondent after transfer of the action to the residence of the latter made upon his motion, may be dismissed out of hand as not bearing "close scrutiny" or as being "further suspect" solely upon the allegations contained in the complaint and cross-claim.

STATUTES AND RULE INVOLVED

Section 1335, 28 U.S.C.:

> *Interpleader.* (a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if
>
> (1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title,

are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another.

Section 1397, 28 U.S.C.:

Interpleader. Any civil action of interpleader or in the nature of interpleader under section 1335 of this title may be brought in the judicial district in which one or more of the claimants reside.

Section 2361, 28 U.S.C.:

Process and procedure. In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order shall be returnable at such time as the court or

judge thereof directs, and shall be addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found.

Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment. As amended May 24, 1949, c. 139, § 117, 63 Stat. 105.

Rule 22, Federal Rules of Civil Procedure:

(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

(2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Title 28, U.S.C., §§ 1335, 1397, and 2361. Actions under those provisions shall be conducted in accordance with these rules. As amended Dec. 29, 1948, eff. Oct. 20, 1949.

STATEMENT OF CASE

This action in the nature of interpleader was instituted under 28 U.S.C. §§ 1335, 1397 and 2361 and Rule 22(2) of the Federal Rules of Civil Procedure in the United States District Court for the Southern District of Florida on January 2, 1964 (I. 1a), transferred to the Northern District of West Virginia on March 31, 1964 (I. 87a) and dismissed by the latter on December 14, 1964 (I. 143a).

In essence the litigation was the renewal of an attempt by petitioner Mrs. Kelly, a citizen and resident of the state of Florida, and the utilities she controls to have judicially determined a long-standing dispute between her and respondent, a citizen and resident of the state of West Virginia, which has continued since their divorce in 1955. The principal issue sought to be resolved was which parent was legally empowered to exercise control over shares of stock in a family-owned utility enterprise held by or for two of their minor children, Richard Greer Raese and John Reeves Raese. In addition, the complaint sought the recovery of damages for injuries caused by respondent to the utility business.

The complaint (I. 10a) alleged that adverse claims relating to the childrens' shares and to cash dividends declared and paid with respect to their interests stemmed on the one hand from the divorce action which Mrs. Kelly instituted in the state of Florida[3] wherein custody of the children and guardianship over their property was by amended final decree given to

---

[3] *Raese* v. *Raese*, Circuit Court of Dade County, Florida, In Chancery, No. 175839.

her (I. 41a)[4] and on the other hand from letters of guardianship respondent obtained from a West Virginia court.[5]

Prior to 1960 the assets of the utilities were divided among three West Virginia corporations, which were named as defendants in this action: Preston County Supply Company ("Supply"), which had issued and outstanding 2471 shares of capital stock, Preston County Light and Power Company ("Power"), and Preston County Telephone Company ("Telephone"). Supply owned all the outstanding shares of Power and Telephone.[6] Mrs. Kelly was undeniably in control of Supply and its subsidiaries by reason of her ownership outright of nearly 70 percent (1,717) of Supply's outstanding shares. The remaining shares of Supply were distributed among her two children, Richard and John, who owned 450 and 300 shares, respectively, the respondent who owned 1 share, and Mrs. Kelly's mother, Agnes J. Reeves Greer, who owned 3 shares.

In March, 1960, shortly after Preston was organized and changes in the powers and policies of the West Virginia corporations were initiated to accommodate expected expansion in the operations of the utilities

---

[4] The Florida court order was implemented, upon respondent's refusal to comply, by cancellation of the certificates in his possession and reissue of the childrens' shares to Mrs. Kelly as trustee, subject to further order of the court (I. 44a, 50a).

[5] The circumstances of the issuance of the letters of guardianship have not been pleaded but appear in a complaint he filed in the state of West Virginia which was incorporated as an exhibit to the complaint in this action (II. 30b).

[6] Possible dispute as to the ownership of three shares of Power is not involved in this action.

to meet competitive conditions, respondent, as the owner of one share of Supply, and purporting to act as guardian of his children's shares[7] instituted a state Court action in West Virginia, against Mrs. Kelly, Supply and Power, *inter alia,* to dissolve the West Virginia corporations and he obtained *ex parte* orders therein restraining the companies from adopting or acting under approved amendments and resolutions which remained in effect for nearly three years. (I. 21a-22a). The harassment which predated respondent's suit has continued with few interruptions to the present time.

Personal service in the state court action was not made on all the persons joined as defendants, and in particular not on Mrs. Kelly. To effectively resolve the adverse claims, an action in the nature of interpleader was instituted in the United States District Court for the District of Delaware by Supply and Preston (to which Mrs. Kelly had transferred the stock she held in Supply individually and as trustee for her children) (P.A. 14a, 22a). Both of these actions remained stagnated for nearly three years[8] until their dismissal with prejudice pursuant to a stipulation under the terms of an overall settlement made

---

[7] Jurisdiction to maintain the action required assertion of ownership of at least 20 percent of the outstanding stock of the corporation. W. Va. Code, c. 31, Art. 1, § 81.

[8] During that long interval while the Delaware case was pending, forward progress was stymied by respondent's resistance to a determination of the issues on their merits. There, as in this case, he resorted to a motion to dismiss to avoid confrontation of the issues, a motion the federal court never acted on.

between Mrs. Kelly and her mother (I. 139a-142a)[9] But relief from the continuing harassment was temporary. In December, 1963, soon after the utility reorganization plan[10] had stockholder approval for transferring the assets of the West Virginia corporations to Public Service, respondent, notwithstanding dismissal of his state court action with prejudice, in essence renewed his suit in the same state court for dissolution of the West Virginia corporations as well as for alternative relief (I. 23a, II. 29b).[11]

Again, the state court did not have personal jurisdiction over Mrs. Kelly, and the instant suit was brought in which all the interested parties could be and were served under 28 U.S.C. 2361. In addition to resolving adverse claims respecting the interests in the childrens' shares of the utility properties, the action was brought to settle acknowledged conflicting claims over dividends which had been declared by Supply

---

[9] Mrs. Greer's control of respondent's litigation was assured under the terms of the settlement agreement which has been the subject of protracted and intense litigation resulting from Mrs. Kelly's mother refusal to acknowledge its binding effect, and which has not yet been fully effectuated. See *Kelly* v. *Greer*, 354 F.2d 209 (C.A. 5, 1965); 334 F.2d 434 (C.A. 3, 1964); 365 F.2d 669 (C.A. 3, 1966), certiorari denied 385 U.S. 1035 (1967). For related proceedings, see *Kelly* v. *Greer*, 295 F.2d 18 (C.A. 3, 1961) and *Kelly* v. *Greer Steel Co.*, 309 F.2d 786 (C.A. 6, 1962).

[10] Under its terms, all of Public Service's shares were to be held by Preston and Preston would have issued and outstanding 9,983 shares to the authorized owners of the shares of Supply in substantially the same ratio as the number of shares each owned in Supply bore to the total number of Supply's shares outstanding.

[11] Demand in the alternative was also made for a money judgment of the value of the shares and the appointment of a receiver of the utilities.

prior to the reorganization[12] and a claim Mrs. Kelly was asserting against the small stock interest respondent owned in his own right.

Concurrently with the commencement of the action Preston deposited with the court stock certificates representing the proportionate interests of the children in the utility business alleged to be represented by 3,030 shares of Preston, a certified check in the sum of $2,253 covering the exact amount of dividends paid out by Supply which are in dispute[13] and a certificate representing the equivalent amount of respondent's individually owned interests (4 shares).[14] The claim

---

[12] The dividends were declared by Supply, during the pendency of the interpleader action in Delaware. An attempt by plaintiffs to amend the complaint to permit resolution of the adverse claims to the dividends was denied by the federal court without prejudice.

[13] The Court of Appeals erroneously found that the dividends were not deposited with the district court although the docket entries clearly disclose such deposit. The error was called to the Court's notice in the petition for rehearing without effect.

[14] Upon institution of suit, petitioner corporations obtained an order restraining the commencement or further prosecution of other actions, including the dissolution suit in West Virginia. On March 5, 1964, while the action was still in the federal court in Florida, the injunction was dissolved without a hearing. The Florida court then transferred the case and files to the District Court in West Virginia although an appeal to the Fifth Circuit had been filed and was pending, thus effectively denying petitioners a right to pursue their appeal as a matter of right. The only alternative open to them—mandamus to the Fifth Circuit—was unsuccessful. Thereafter, the transferee court in West Virginia refused to schedule argument on petitioners' renewed motion which was filed on September 18, 1964 seeking restoration of the restraint against prosecution of the state court action upon a finding, again without the benefit of hearing, that the ground for its issuance had "more or less evaporated" by the time the West Virginia court had issued its November 13, 1964 opinion granting the dismissal motion (I. 148a). Petitioners' further application for an injunction pending appeal was dismissed on the ground that if granted it would "delay the facilitation of the case to its ultimate conclusion." (I. 148a)

for damages, mentioned above, is predicated on allegations of a series of acts of misconduct which have resulted in financial injury to the business and depleted its value as a going concern. These were alleged to have commenced in 1955 when respondent was involved in the management of the business.

Respondent filed no responsive pleading; the West Virginia corporations and Mrs. Kelly filed answers admitting the allegations of adverse claims. Additionally, Mrs. Kelly cross-claimed for a declaration under 28 U.S.C. § 2201(2) of the validity and effect of the state court decrees on which her claim as custodian and guardian of her children's persons and property was based and a declaration of her status as trustee of certificates representing the children's shares in the utility enterprises. She also sought enforcement of a money judgment entered against the respondent in the domestic relations proceedings, including execution thereof against the shares respondent owned individually, and moved for summary judgment thereon (I. 31a).

Respondent's opposition took the form of a series of motions to dismiss the complaint, to dissolve the injunction, alternatively to strike the portions of the complaint seeking damages against respondent personally, and for transfer of the action to the federal court in West Virginia (I. 57a-68a), to strike and quash the joint answer of the West Virginia corporations, to strike and quash and to dismiss Mrs. Kelly's answer, to dismiss or strike in part her cross-claim and to strike and quash her motion for summary judgment (I. 2a-3a, 71a-73a).

The transferee court's dismissal of the entire action was based on the state court's assumed prior juris-

diction of the controversy, an unwarranted conclusion that all issues between petitioners and respondent could be resolved in that court and its finding that Preston was in no real danger of suit from Mrs. Kelly. While it purported not to do so, the District Court, in affirming the dismissal, made findings on the merits that are without record support. Particularly damaging were its conclusions that the Florida divorce court acted *ex parte*, that the creation of the petitioner corporations were organized for impliedly improper purposes, and by its obvious determination (without resort to evidence) that respondent was the children's guardian and fiduciary, as appears from its findings that the orders of the Florida court were designed to "get" control of the children's property and that Mrs. Kelly's action was designed to "circumvent" the West Virginia law (I. 163a, 168a).

The Court of Appeals affirmed the District Court's decision 22 months after hearing argument on the appeal in which it approved the denial of "this attempt to bring this continuing internecine war in the District Court." (R. 35).

REASONS FOR GRANTING THE WRIT

The judgment of the Court of Appeals should be reviewed not just because it does violence to the basic purposes underlying the grant of interpleader jurisdiction to federal courts but more important because affirmance of the judgment of dismissal continues to deprive petitioners of their rights to a determination by a court of their choice of issues of fact and law which have been in dispute for many years.

As we show, the exercise of interpleader jurisdiction is not a matter of judicial discretion once juris-

dictional requisites have been met. In those circumstances a federal court may not, on casual assessment of the truth of the facts or on unproved pretexts, decline to accept a case in which adverse claims have been alleged respecting property deposited with a federal district court, where its refusal is obviously governed by disdain to entertain a controversy involving a much litigated and bitter family dispute. Unless review is allowed and the case remanded, first, for a determination of the fact whether adverse claims have been or will be asserted (if that question can indeed be raised in good faith) and, secondly, for a determination of which claims should prevail, it will not only encourage federal courts to drastically dilute their jurisdiction in diversity cases to those they wish or find it convenient to hear, but it will frustrate the purposes of the interpleader jurisdiction conferred on them by Congress and increase the number of suits not capable of definitive disposition—such as suits between persons all of whom are not subject to the jurisdiction of a local court. Thus the refusal of the courts to even call upon the respondent to file a pleading admitting or denying the allegations raises question whether basic rights of the petitioners who have sought a jury determination of their claims have been grossly abused.

It is significant that the respondent has, by resort solely to motions to dismiss, been successful in both this suit and the prior interpleader action (of which the instant action is substantially a continuation) in avoiding even the preliminary step of admitting or denying that he is asserting a claim to any of the interpleaded property. Long and costly periods of delay

and the almost invariable refusal of the courts[15] to entertain evidence of claimed rights or injury have been a recurrent theme throughout the history of this family litigation. The cumulative result of the decisions seems to establish the frightening doctrine that the federal courts may in diversity actions arising out of a family dispute prejudge the truths of the facts alleged merely upon a motion to dismiss. Such an approach to jurisdiction, no matter how couched not only is violative of basic private rights but is conducive to the creation of a precedent barring access to federal courts in matters the courts deem too distasteful to hear and dispose of on the merits.

Control of the Stakeholder by One of the Adverse Claimants Does Not Make the Interpleader Action Collusive.—Although the Court of Appeals acknowledged the existence of a *bona fide* dispute between Mrs. Kelly and the respondent Raese, it nevertheless affirmed the dismissal of the complaint on the expressed ground that it was collusively brought in Florida by the Delaware corporations to get *in personam* juris-

---

[15] Of the numerous suits instituted in this family litigation, only one was decided after a hearing on the merits but the verdict for defendant (i.e., petitioner Mrs. Kelly) was reversed on appeal and remanded for a new trial. *Preston County Coke Co.* v. *Preston County Light and Power Co.*, 146 W.Va. 231, 119 S.E.2d 420 (1961). But even there judgment was entered for plaintiff upon remand upon motion for summary judgment. Mrs. Kelly has been consistently frustrated from obtaining a hearing on the merits in numerous actions: *Kelly* v. *Greer Steel Co.*, 309 F.2d 786 (C.A. 6, 1962); *Kelly* v. *Greer*, 334 F.2d 434 (C.A. 3, 1961), 365 F.2d 669 (C.A. 3, 1966), certiorari denied 385 U.S. 1035. A suit brought by her mother in a Florida state court in 1957 was dismissed by agreement of the parties this year without ever coming to trial, although it tied up very valuable real estate of Mrs. Kelly's the entire intervening period.

diction over respondent on other claims.[16] Since the allegations in a complaint must be taken as true upon a motion to dismiss, the inference of improper motivation cannot reasonably be drawn from the simple fact that the complaint joined a claim for damages against one of the adverse claimants with its request for a determination of adverse claims to property deposited with the court.

Even if, *arguendo,* the claim for damages was deficient on jurisdictional grounds, the impact of that fact upon the *bona fides* of an allegation that adverse claims were being asserted against property in court would seem highly irrelevant. Under such circumstances, a claim improperly joined with one sufficiently pleaded would alone be subject to dismissal. Respondent's motion to strike allegations upon which judgment for damages was sought which, if granted, would have left for decision solely the issue of adverse claims, was never acted upon by the court.

The conviction that the entire action was improperly founded seems to have its genesis in both the district

---

[16] The District Court additionally relied on the prior pendency of the state court action contrary to this Court's holdings in numerous cases. See *Chicot County* v. *Sherwood,* 148 U.S. 529, 534 (1893); *McClellan* v. *Carland,* 217 U.S. 268, 282 (1910); *Kline* v. *Burke Construction Co.,* 260 U.S. 226 (1922); *Commonwealth Trust Co.* v. *Bradford,* 297 U.S. 613 (1936); *Markham* v. *Allen,* 326 U.S. 490 (1945); *England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. 411 (1964). Also see *Liberty Mutual Insurance Co.* v. *Pennsylvania Railroad Co.,* 322 F.2d 963, 968 (C.A. 7, 1963); *Maryland Casualty Co.* v. *Glassell-Taylor & Robinson,* 156 F.2d 519, 525 (C.A. 5, 1946). Moreover, the clear language of 28 U.S.C. § 2361 is specifically empowering federal courts to restrain the institution *or* prosecution of any action (federal or state) affecting the property involved in the interpleader action emphasizes the importance of protecting the court's interpleader jurisdiction. *Treinies* v. *Sunshine Mining Co.,* 308 U.S. 66 (1939).

and appellate courts' complete reliance on *Bierman* v. *Marcus,* 246 F.2d 200, (C.A. 3, 1957), certiorari denied 356 U.S. 933 (1958). In focusing upon *Bierman* as the mainstay for their support, both courts unrealistically equated collusion to the absence of fear of exposure by a stakeholder to double liability or to prosecution *by its controlling stockholder.*

Examination of the facts in that case lends no logical support to such conclusion. In *Bierman,* where the controlling stockholder sought to implead a corporation he controlled and a former controlling stockholder to determine rights in a fund plaintiff had deposited with the court, it was found on the facts *after extended hearings* that the corporation was *not* claiming the fund adversely or otherwise. In this case, there has been neither hearing nor even a formal denial of the existence of adverse claims. The presence of collusion can only be determined upon a finding of fact that there is no *bona fide* dispute. In reaching its conclusion that the action in *Bierman* was not brought in good faith, the Third Circuit noted that it took four years before either defendant filed an answer to the complaint and when they did neither of them claimed the fund, stating (at p. 202): "Hearing disclosed no dispute between the original defendants over the interpleaded funds." The Third Circuit relied on responsive pleadings and factual evidence to reach its conclusion, not by looking behind the allegations of adverse claims made in a complaint.

It is obviously the absence of disputing claims over property which is interpleaded and not the mere fact of control of the stakeholder by one of the adverse claimants that governed the Third Circuit's decision. See *United Benefit Life Insurance Co.* v. *Katz,* 155

F. Supp. 391, 393 (E.D. Pa. 1957). Such control might well be irrelevant as a source of vexatious litigation or threats thereof. Control alone has not been a bar to the maintenance of interpleader. *Toledo* v. *Toledo Ry. and Light Co.*, 259 Fed. 450 (C.A. 6 1919); *St. Louis Southwestern Railway Co.* v. *Meyer*, 364 Mo. 1057, 272 S.W. 2d 249 (1954), appeal dismissed, 349 U.S. 942 (1955).

A basic purpose for invoking interpleader jurisdiction is to avoid the harrassment of litigation and to resolve in a single action the validity of adverse claims which are found to be asserted in good faith. The statute is remedial and to be liberally construed. *Sanders* v. *Armour Fertilizer Works*, 292 U.S. 190, 198 (1934). As stated by Judge Maris (now on the Third Circuit bench) in *Metropolitan Life Ins. Co.* v. *Segaritis*, 20 F. Supp. 739 (E.D. Pa. 1937), at p. 741:

> [I]t thus becomes clear that the jurisdiction of this court to entertain an interpleader bill does not depend upon the validity or even bona fides of the claims of the respective defendants. It is obvious that in almost every case the claim of one of the parties will ultimately be determined to be invalid. That, however, is a matter for determination at the trial and cannot affect the jurisdiction of the court.

It would seem naive to conclude that the hazard of litigation does not exist because of Mrs. Kelly's control of Preston, except upon the wholly unrealistic premise that she will forever refrain from asserting her claims in opposition to those of the respondent. It is a fundamental principle of interpleader that its office is not so much to protect a party against double liability as against double vexation in respect of one

liability. *National Fire Ins. Co.* v. *Sanders,* 38 F.2d 212, 214 (C.A. 5, 1930).

Admittedly abject surrender by one litigant will effectively eliminate the hazard of a multiplicity of suits but the history of the litigation between the adverse claimants here emphatically indicates that dismissal will increase rather than diminish the number of suits involving the very issues sought to be resolved in this action. Since 1960 four separate suits have been instituted involving the children's shares; two of them also relate to the dividends. Respondent furthermore has intervened in state public service commission proceedings on grounds which would be determined in the interpleader action. Thus, one of the distinctive purposes of interpleader, the termination of present and the avoidance of further vexatious litigation between the disputing parties (not between one of them and the stakeholder she controls) was improperly denied by the court's refusal to take jurisdiction of the action.

The Courts Below Were Improperly Influenced by by Evaluations of the Merits of the Controversy Which Were Reached Without Benefit of Responsive Pleadings, Affidavits, or Evidence.—Despite declarations to the contrary, the decisions of both the District Court and the Court of Appeals contained findings of fact upon the merits of the allegations in both the complaint and cross-claim which must be recognized as having influenced their decisions. Both overlooked or deemed inconsequential the requirement that motivations of the petitioners or the *bona fides* of their claims or truth of the allegations are not soluble on a motion to dismiss. The prejudgment is self evident: the Court

of Appeals found that the joinder of a large claim for damages against respondent "[t]hough not suspect in itself" nevertheless made the entire action one which "does not bear close scrutiny." Whatever doubt the Court might have held in reserve at that stage of examination seems to have been completely dissipated by the cross-claim which made the action (in the Court's opinion) further suspect as one seeking a declaratory judgment of the validity of the *res* which was deposited with the district court. Thus the existence of interpleader jurisdiction was determined on a casual prejudgment of the motives behind the suit as read into the facts alleged and the relief sought by the complaint and cross-claim, and not upon the statutory provisions which were met for interpleader jurisdiction: diversity of citizenship and allegations of adverse claim to money or property of a statutory amount and its deposit with the court. 28 U.S.C. § 1335.

It has been the settled rule that the only question to be decided on a motion testing the validity of a complaint in interpleader or in the nature of interpleader is whether the essential jurisdictional facts have been alleged. *Railway Express Agency, Inc.* v. *Jones,* 106 F.2d 341, 344 (C.A. 7, 1939); *Roberts* v. *Metropolitan Life Ins. Co.,* 94 F.2d 277, 280 (C.A. 7, 1938), certiorari denied, 303 U.S. 660 (1938). Diversity and the deposit of a statutory *res* have not been challenged. Thus, it is elementary that the truth of allegations of adverse claims and hence a determination whether interpleader has been properly brought can only be tested by a traverse pleading, not by motion, argument of counsel or divine perception. Contrary to the views held by both courts below, interpleader jurisdiction conferred on federal courts is not

within their discretion to accept or reject. *Meredith* v. *Winter Haven,* 320 U.S. 228, 234 (1943); *Markham* v. *Allen,* 326 U.S. 490 (1946); *England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. 411, 415 (1964). Access to the federal courts extends as well to the judicial settlement of an "internecine war" (R. 35)[17] between former partners to a marriage as it does to any "war" between unrelated litigants. Divorce does not relegate its participants to a status of second-class citizenship.

Nor is the Court's doubt as to the validity of the *res* on deposit a justifiable ground for dismissal of the action. Until it is otherwise established as fact, the character of the *res* is determined by the complaint, not by collateral contentions or inferences. As stated in *Wertheimer* v. *Bank of Nova Scotia,* 140 F. Supp. 950 (S.D. N.Y. 1956), at p. 953:

> The fact that defendant proposes to deposit certificates of stock and not the sum which the plaintiff demands in his complaint [money damages for conversion], does not require denial of the motion for leave to make the deposit. It is that which the alleged stakeholder has in his custody or possession which is required to be deposited with the Clerk of the Court under the interpleader statute * * * [P]laintiff requests that the court, in lieu of the deposit of the stock, order its sale or direct the defendant to consent to a sale, the proceeds to be deposited with the court. To grant this request, assuming power to do so, would in effect recognize plaintiff's claim to the shares and disregard [the opposing] claim—the very issue to be decided—but not on this motion

[17] The words are those of the Court of Appeals (App., *infra,* p. 2a).

which, as already noted, is a preliminary to an application for interpleader relief.

Wertheimer was expressly approved in *Douglas-Guardian Warehouse Corporation* v. *Ramy Seed Co.*, 271 F.2d 24 (C.A. 8, 1959) where the court stated, at p. 27:

> [I]t is that which the person who invokes interpleader asserts is the subject matter of the conflicting claims and which is in his possession that determines what is to be deposited in court.

It was improper to consider preliminarily whether adverse claims were being asserted over equity interests in a utility enterprise or to different evidences of title which the adverse claimants might contend represent those interests. In posing the problem and suggesting that it might be a ground to defeat jurisdiction, the Court ignored the fact that the deposited shares had their origin in certificates issued by Supply, (although common origin of the disputed claims has not since the interpleader statute was amended in 1926 been a requirement for maintaining a suit in interpleader). As stated in the *Douglas-Guardian* case:

> It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers he is not liable in whole or in part to any or all of the claimants.

It seems genuinely unrealistic to suggest that respondent is asserting no claim to the Preston certificates into which the Supply shares have been trans-

formed since the dispute is unquestionably over the property interests they represent.

Moreover, all these reservations about the identity of the property in dispute were rendered insignificant by the deposit of a certified check representing the Supply dividends. This alone provided indisputable subject matter for interpleader jurisdiction. And a determination of the right to those dividends will fully resolve the dispute over the shares. The Court of Appeals did not face the question since it failed to accept the fact of such deposit and ignored it when its erroneous finding was called to its attention in the petition for rehearing.[18]

This Case Should be Considered With a View to its Remand to Resolve All the Issues Raised or to be Raised by the Pleadings.—To avoid a stalemate of the resolution of the conflicting claims and a denial of due process attendant upon the refusal of the federal courts to hear and decide a dispute which has been in existence for more than 10 years and which have been (with one slight interruption) in litigation since 1960,

---

[18] The petition for rehearing stated, in part (R. 53):

> "• • • there can be no ignoring of the fact that dispute exists over the cash dividends declared and paid on the equity interests, and this Court's finding that no cash was paid into court is patently in error. It clearly appears from the docket entries that a receipt was given by the district court for stock certificates '(and dividends in the amount of $2,253.00).' (Appellants' App. p. 1a)."

The trial court ignored the dividend deposit except to state that the complaint sets up as the property in controversy "the Preston shares and dividends paid by Supply". The erroneous conclusion of the Court of Appeals might be predicated on the order of the Florida District Court transferring the action which flatly stated that the "stock has been deposited in the registry of the court but the dividends were not so deposited." (I. 89a).

the case should be remanded for a full and final determination without further delays of all the issues raised by pleadings in response to the complaint and cross-claim, including the claims asserted against respondent personally.

There can no longer be a basis for respondent to claim immunity from the court's jurisdiction. After service of process upon all the defendants pursuant to the provisions of 28 U.S.C. § 2361, respondent elected to appear and defend on the merits as reflected by 42 separate docket entries made prior to issuance of the transfer order (I. 1a-4a). Among his affirmative steps included an attack on the court's jurisdiction over his person, objection to the venue, his assertion of equitable defenses and his challenge of Mrs. Kelly's cross-claim for declaratory judgment (I. 57a-68a, 71a-73a). His appearance in the action and the degree of his participation clearly constituted a submission to *in personam* jurisdiction. How many years can a claim that an adverse interest exists with respect to deposited property be resisted in the federal courts by a party's employing purportedly defensive motions without subjecting that party to the court's *in personam* jurisdiction? In *Merchants Heat & Light Co.* v. *Clow & Sons,* 204 U.S. 286 (1907), this Court said, at p. 290:

> There is some difference in the decisions as to when a defendant becomes so far an actor as to submit to the jurisdiction, but we are aware of none as to the proposition that when he does become an actor in a proper sense he submits.

There would seem to be little ground for asserting that he did not become such an actor but assuming

arguendo that the degree of his participation prior to transfer did not constitute submission, the act of moving for a change of venue was a consent to appear generally to contest the action on its merits. In *Hill* v. *Upper Mississippi Towing Corporation,* 141 F. Supp. 692, 694 (D.C. Minn. 1956) a motion made under 28 U.S.C. § 1404(a) was held to be a consent to make a general appearance to contest the action on the merits and a waiver of objections to venue and jurisdiction.

In addition, the character of respondent's objections —pendency of the state court action and the good faith of petitioners—were equitable defenses subject to waiver by him, *McGowan* v. *Parish,* 237 U.S. 285, 295 (1914) and waived by his multi-faceted motions which resulted in transfer and the denial *sub silentio* of his equitable defenses. Since a federal court may not question jurisdiction on equitable grounds *sua sponte* where consent to jurisdiction has been given, *Levinson* v. *United States,* 258 U.S. 198, 200 (1921), respondent could not again urge the same grounds in support of his motion to dismiss in the transferee court. The transferor court, moreover, in granting the motion to transfer necessarily acknowledged that it had subject matter jurisdiction of the action, since such jurisdiction is a required ingredient of transfer power. *First National Bank of Chicago* v. *United Air Lines,* 190 F.2d 493 (C.A. 7, 1951), reversed on other grounds 342 U.S. 396 (1952). Process on all claimants having been issued under 28 U.S.C. § 2361, the District Court had no discretion but to assume jurisdiction to "hear and determine the case". 28 U.S.C. § 2361.

Furthermore, neither court below considered in these circumstances whether either of petitioners' claims

could be maintained after transfer independent of interpleader jurisdiction. *Elliott* v. *Federal Home Loan Bank Board,* 233 F. Supp. 578, 588 (S.D. Cal. 1964). Jurisdictional defects which might have been inherent in the action prior to transfer no longer presented a bar to the maintenance of either claim when they were transferred to the district of respondent's residence by his own voluntary act.

The dismissal of both claims without regard to the flexibility for the speedy disposition of claims contemplated by the federal rules constituted an abuse of discretion since the form in which they were couched was no ground for avoiding deciding them on the merits. The rules were designed and intended to be construed "to secure the just, speedy, and inexpensive determination of every action." *Foman* v. *Davis,* 371 U.S. 178, 181-182 (1962); *Provident Security Life Ins. Co.* v. *Gorsuch,* 323 F.2d 839 (C.A. 9, 1963), certiorari denied, 376 U.S. 950 (1964).

What occurred here is the antithesis of that envisaged by Mr. Justice Goldberg in *Foman* as to the proper role of the federal rules. It has delayed attempts initiated more than six years ago to obtain a court decision on the merits, and seeks to impose, in addition to the heavy expenses of litigation petitioners have already suffered, further expenses in litigation in a state court which has no jurisdiction over Mrs. Kelly that cannot be decisive of the issues raised in this action. Not only does the judgment presage further delays and further expense but it poses grave question whether the petitioners can ever obtain a hearing in a federal court where they have a statutory right to have the issues resolved. If the trial court is directed

to assume jurisdiction and hear and determine the case, full and final relief can be accorded the parties within the intendment of the interpleader statutes.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM H. ARKIN
1001 Pennsylvania Building
Washington, D. C.
Attorney for Petitioners

August 25, 1967

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 9918.

JANE GREER KELLY, individually and/or in any fiduciary capacity, and as legal guardian and custodian of RICHARD GREER RAESE and JOHN REEVES RAESE, Defendants, *Appellant*,

versus

RICHARD GREER RAESE and JOHN REEVES RAESE, infants, by RICHARD AUBREY RAESE, their duly authorized legal guardian; RICHARD AUBREY RAESE, as legal guardian of RICHARD GREER RAESE and JOHN REEVES RAESE, infants, and RICHARD AUBREY RAESE, individually, *Appellees*.

No. 9919.

PRESTON CORPORATION AND PRESTON PUBLIC SERVICE CORPORATION, Plaintiffs, *Appellants*,

versus

RICHARD GREER RAESE and JOHN REEVES RAESE, infants, by RICHARD AUBREY RAESE, their duly authorized legal guardian; RICHARD AUBREY RAESE, as legal guardian of RICHARD GREER RAESE and JOHN REEVES RAESE, infants, and RICHARD AUBREY RAESE, individually, *Appellees*.

Appeals from the United States District Court for the Northern District of West Virginia, at Fairmont.

Sidney L. Christie, District Judge.

Decided April 18, 1967.

Before Haynsworth, Chief Judge, Sobeloff, Circuit Judge, and Hutcheson, District Judge.

HAYNSWORTH, Chief Judge:

This appeal is from a decision by the District Court for the Northern District of West Virginia dismissing both an

action in the nature of an interpleader and a cross-claim by one defendant against another.[1] We think the District Court properly dismissed this attempt to bring this continuing internecine war into the District Court.

Raese, a West Virginia resident, and Mrs. Kelly, a Florida resident, were husband and wife until divorced in May, 1955. Mrs. Kelly was in control of several West Virginia Corporations, the outstanding stock of which was distributed as follows:

Preston County Supply Company:

Jane G. Kelly (defendant-appellant)	1717 Shares
Richard Greer Raese (minor child)	450 "
John Reeves Raese (minor child)	300 "
Agnes J. Reeves Greer (mother of JGK)	3 "
Richard Aubrey Raese (defendant-appellee)	1 "
Total	2471 Shares

Preston County Light & Power Company:

Preston County Supply Company	497 Shares
Agnes J. Reeves Greer	3 "
Total	500 Shares

Preston County Telephone Company:

Preston County Light & Power Company	2500 Shares
Total	2500 Shares

In October and November, 1963 these corporations went through a plan of reorganization by which their assets were transferred to Preston Public Service Corporation, a Delaware corporation. All the outstanding stock of Preston Public Service Corporation was issued to Preston Corporation, another Delaware corporation. Shares of Preston Corporation were issued to shareholders of Preston County Supply Company in exchange for their stock.

---

[1] Preston Corp. v. Raese, N.D.W.Va., 236 F. Supp. 135 (1964).

The minority stockholders of Preston County Supply Company have contested the 1963 reorganization.[2] Raese claims that he is entitled to vote 750 shares of the stock of Preston County Supply Company as legal guardian of the two minor children. His claim derives from an order of the Circuit Court of Monongalia County, West Virginia by which the minors were placed in his custody. Mrs. Kelly claims the right to vote the stock as trustee of the stock for the benefit of the two children. Her claim is based on an *ex parte* order of the Eleventh Judicial Circuit Court in Dade County, Florida.

To resolve this controversy and litigate others, or to avoid their resolution in the actions pending in the state courts of West Virginia, Preston Corporation and Preston Public Service Corporation, the Delaware corporations, as plaintiffs, brought this action in the nature of an interpleader in the United States District Court for the Southern District of Florida.[3] Raese, Mrs. Kelly, the two minors, and the three West Virginia corporations were named as defendants. Mrs. Kelly and the West Virginia corporations[4] were served in Florida. Raese and the

---

[2] An action was instituted by Raese on December 5, 1963 in the Circuit Court of Preston County, West Virginia for this purpose. This suit was brought by Raese in his own right and as legal guardian for the two minor Raese boys. The three West Virginia corporations, Preston Corporation, the Kellys, and Agnes J. Reeves Greer were made defendants. The four corporations entered general appearances. The Kellys, nonresidents, were proceeded against by publication under West Va. Code 56-3-23, 24.

Additionally, in February, 1964 the corporations applied to the West Virginia Public Service Commission for approval of the reorganization since West Virginia public utility properties were involved. The Raeses have intervened in this action which has been stayed pending the outcome of the proceeding in the Circuit Court of Preston County.

[3] Jurisdiction was based upon 28 U.S.C. §§ 1335, 1397 and 2361.

[4] Service was made upon an assistant secretary of the corporations in Florida.

minors were served in West Virginia pursuant to the nationwide service of process provisions of 28 U.S.C. § 2361. The property deposited in court was 3,034 shares of Preston Corporation, 3,030 of which were alleged to be adversely claimed by both Raese and Mrs. Kelly in their fiduciary capacities.[5] In addition to the interpleader relief, the Delaware corporations sought an injunction against pending state court actions and damages of $743,587 against Raese for alleged wrongs to the corporations.

Mrs. Kelly and the West Virginia corporations answered admitting all allegations of the complaint. At the same time, Mrs. Kelly cross-claimed against Raese seeking a declaratory judgment of the rights she claims as custodian of the children and her rights as trustee of their stock. Mrs. Kelly also joined a claim for money damages of $68,000 arising from a dispute incident to her divorce from Raese. In addition, she moved for summary judgment on her claims.

On motion by defendant, Raese, to dismiss or transfer, the action was transferred to the Northern District of West Virginia.[6] Raese then moved the West Virginia District Court to dismiss and that court granted the motion. The court based the dismissal on the collusive nature of the interpleader suit, the pendency of a state court action involving some of the same issues, and the availability of adequate remedies in the state courts to adjudicate all the claims involved.

There is a basis for a finding that the interpleader suit was collusively brought in Florida by the Delaware corpora-

---

[5] Although the interpleader complaint alleges also, as property in dispute, $2253.00 dividends paid or payable by Preston County Supply Company, no cash was paid into court.

[6] Mandamus to rescind the transfer order was denied, 5 Cir., No. 21415, April 7, 1964. Appeal from the transfer order was dismissed by this Court. Preston Corp. v. Raese, 4 Cir., 335 F.2d 827.

tions to get *in personam* jurisdiction of Raese on the other claims. In *Bierman* v. *Marcus*[7] an interpleader action was dismissed because the stakeholder did not have a "real and reasonable fear of exposure to double liability or the vexation of conflicting claims to justify interpleader."[8] The plaintiffs in that action were in complete control of an interpleaded corporate defendant. When they interpleaded the corporation they knew it had no claim on them and could not even assert a fictitious claim without their consent. In the case at bar the positions are reversed. Here, it is the interpleader plaintiff which is completely controlled by one of the interpleaded defendants. Despite the transposition there is the same identity of interest between the plaintiff and an interpleaded defendant which prevents the action from being predicated upon a bona fide fear of vexatious conflicting claims. There is clearly a dispute between Mrs. Kelly and Raese, but it would be unrealistic to say that Preston Corporation has any fear of vexatious claims by Mrs. Kelly who is the major, controlling stockholder and chief executive officer of the corporation.

Moreover, the prayer for interpleader relief was joined by a large claim for damages against defendant, Raese. Though not suspect in itself, when viewed in the context of this acrimonious family dispute and the identity of interest between the Delaware corporations and Mrs. Kelly, the suit does not bear close scrutiny.

The interpleader action is further suspect from the face of the pleadings. It is apparent from Mrs. Kelly's cross-claim[9] that, in essence, what she and Preston Corporation

---

[7] 3 Cir., 246 F.2d 200, *cert. denied*, 356 U.S. 933.

[8] 246 F.2d at 202.

[9] There has been a reluctance to allow unrelated in personam cross-claims by one adverse claimant against another when nation-wide service of process has been used. *See, e.g.*, Hagan v. Central Ave. Dairy, Inc., 9 Cir., 180 F.2d 502; Hallin v. C. A. Pearson, Inc., N.D. Calif., 34 F.R.D. 499 (1963).

are seeking is a declaratory judgment as to the validity of the *res* deposited in court as a jurisdictional prerequisite. The issue of the validity of the *res* predominates over the rival claims to the *res*. Since the Raeses object to the reorganization as a nullity, their claim might even be said to be directed to a different *res*, the 750 shares of Preston County Supply Company.

Accordingly, we affirm the District Court's ruling that interpleader jurisdiction has been improperly invoked.

Affirmed.

Judgment

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 9919.

PRESTON CORPORATION AND PRESTON PUBLIC SERVICE CORPORATION, Plaintiffs, *Appellants*,

vs.

RICHARD GREER RAESE and JOHN REEVES RAESE, infants, by RICHARD AUBREY RAESE, their duly authorized legal guardian; RICHARD AUBREY RAESE, as legal guardian of RICHARD GREER RAESE and JOHN REEVES RAESE, infants, and RICHARD AUBREY RAESE, individually, *Appellees*.

Appeal from the United States District Court for the Northern District of West Virginia.

This cause came on to be heard on the record from the United States District Court for the Northern District of West Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Dis-

trict Court appealed from, in this cause, be, and the same is hereby affirmed with costs.

Filed
Apr 18, 1967
MAURICE S. DEAN
Clerk

HAYNSWORTH
Chief Judge, Fourth Circuit

Judgment

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 9918.

JANE GREER KELLY, individually and/or in any fiduciary capacity, and as legal guardian and custodian of RICHARD GREER RAESE and JOHN REEVES RAESE, Defendants, *Appellant,*

vs.

RICHARD GREER RAESE and JOHN REEVES RAESE, infants, by RICHARD AUBREY RAESE, their duly authorized legal guardian; RICHARD AUBREY RAESE, as legal guardian of RICHARD GREER RAESE and JOHN REEVES RAESE, infants, and RICHARD AUBREY RAESE, individually, *Appellees.*

Appeal from the United States District Court for the Northern District of West Virginia.

This cause came on to be heard on the record from the United States District Court for the Northern District of West Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby affirmed with costs.

Filed
Apr 18, 1967
MAURICE S. DEAN
Clerk

HAYNSWORTH
Chief Judge, Fourth Circuit

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 9918.

No. 9919.

Appeals from the United States District Court for the Northern District of West Virginia, at Fairmont.

After careful consideration by the entire Court of the Petition for Rehearing En Banc,

It is ordered that the Petition for Rehearing En Banc be, and it hereby is, denied.

Filed
May 30, 1967
MAURICE S. DEAN
Clerk

CLEMENT F. HAYNSWORTH, JR.
Chief Judge, Fourth Circuit

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

Opinion of November 13, 1964

Filed December 14, 1964

SIDNEY L. CHRISTIE, DISTRICT JUDGE:

This is a diversity action in the nature of an interpleader brought under 28 U.S.C., Secs. 1335, 1397 and 2361, and Rule 22 (2) of the Federal Rules of Civil Procedure, and it is here on transfer, for the convenience of the parties, from the United States District Court for the Southern District of Florida. An appeal taken by plaintiffs from the transfer was dismissed by the United States Court of Appeals for the Fourth Circuit on 7-27-64. Preston Corporation, et al. v. Raese, 335 F.2d 827.

It should be helpful to an understanding of this case to give as concisely as the facts will permit a narrative back-

ground of the positions of the parties adversary, the nature of their respective grievances, the relationship each bears to the other, and the methods each has employed to protect or vindicate his position.

The controversy giving rise to this litigation appears to have been initiated by Jane G. Kelly, as majority stockholder of Preston County Supply Company, a West Virginia corporation, on the 10th day of October, 1963, when she inaugurated a plan of reorganization which would encompass not only that company but also its subsidiary, Preston County Light and Power Company, likewise a West Virginia corporation. Under the plan of reorganization, the assets of these West Virginia companies were to be transferred to the Preston Public Service Corporation, a Delaware corporation, and in exchange therefor shares of Preston Public Service Corporation, constituting all of its outstanding stock, were to be issued to Preston Corporation, another Delaware corporation, and shares of Preston Corporation were then to be issued to the shareholders of Preston County Supply Company in exchange for their outstanding shares therein. Though not a party to the plan of reorganization, Preston Telephone Company, another West Virginia corporation and a wholly owned subsidiary of Preston County Light and Power Company, was made a party defendant to the interpleader and it is alleged therein that its assets were also transferred to Preston Public Service Corporation pursuant to the plan of reorganization. For brevity, Preston County Supply Company will hereinafter be referred to as "Supply Company"; Preston County Light and Power Company as "Power Company"; Preston Telephone Company as "Telephone Company"; Preston Corporation as "Preston"; and Preston Public Service Corporation as "Public Service."

At the inception of the plan or reorganization, the shareholders of record of Supply Company, Power Company,

and Telephone Company and the extent of their respective holdings therein were as follows:

SUPPLY:

Jane G. Kelly,	1,717 shares
Richard Greer Raese,	450 shares
John Reeves Raese,	300 shares
Agnes J. Reeves Greer,	3 shares
Richard Aubrey Raese,	1 share
Total,	2,471 shares

POWER:

Preston County Supply Company,	497 shares
Agnes J. Reeves Greer,	3 shares
Total,	500 shares

TELEPHONE:

Preston County Light and Power Company,	2,500 shares
Total,	2,500 shares

A special meeting of the stockholders of Supply Company was called for 10-22-63 at Palm Beach, Florida, to consider adoption of the plan of reorganization, notice of which reached the minority stockholders on 10-14-63. At this meeting, the plan was approved over the vote and objection of the minority stockholders, and they, through their attorney, on 10-31-63, notified the directors of Supply Company that they could not be required to accept, over their objections, shares of stock in Preston for their holdings in Supply Company, and called upon the directors to set aside and pay in cash to them the fair value of their respective shares in Supply Company. This protest and demand of the minority stockholders was ignored, and by letter of 11-19-63, H. B. Kelly, husband of Jane G. Kelly,

as secretary of Supply Company, notified counsel for the minority stockholders that only stockholders of record 10-10-63 were entitled to vote at the special meeting of 10-22-63, and that the corporate records on such date did not disclose that Richard Greer Raese and John Reeves Raese were holders of any of Supply Company stock.[1] Simultaneously with the 10-22-63 special meeting of stockholders of Supply Company, a special meeting of stockholders of Power Company, called for the same time and place and for the same purpose, was held, and at which meeting Agnes J. Reeves Greer, as the minority stockholder in that company, voted and objected against approval of the plan of reorganization, but likewise to no avail. The record is silent as to whether or not stockholder approval of Telephone Company's coming into the plan was sought or obtained.

The plan of reorganization appears to have been consummated on or about November 1, 1963, under which the assets of Supply Company, Power Company, and Telephone Company were transferred to Public Service, and in exchange therefor Public Service issued all its outstanding stock to Preston. Thus, the shareholders of Preston and their holdings therein emerged as follows:

Jane G. Kelly,	6,937 shares
Jane G. Kelly, as Trustee for Richard Greer Raese, a minor,	1,818 shares
Jane G. Kelly, as Trustee for John Reeves Raese, a minor,	1,212 shares
Agnes J. Reeves Greer,	12 shares
Richard Aubrey Raese,	4 shares
Total,	9,983 shares

[1] This position may be explained by the cancellation of the infants' share certificates and the re-issue thereof in the name of Jane G. Kelly, as their trustee, pursuant to Judge Holt's orders, later herein referred to.

An aftermath of the consummation of the plan of reorganization, carried out over the protest of the minority stockholders, was the bringing of an action on 12-5-63 in the Circuit Court of Preston County, West Virginia, by Richard Greer Raese and John Reeves Raese, infants, by Richard A. Raese, their next friend and legal guardian; and Richard A. Raese, in his own right, as plaintiffs, against Supply Company, Power Company, Preston, Jane Greer Kelly, H. B. Kelly, and Agnes J. Reeves Greer, as defendants, in which it is, among other things, alleged:

(1) That Richard Greer Raese and John Reeves Raese are infants and that Richard A. Raese is their father and legally appointed, qualified and acting guardian under appointment as such by the County Court of Monongalia County, West Virginia, under date of 6-22-55;

(2) That the infants are the owners of 450 and 300 shares, respectively, of the shares of stock of Supply Company and that Richard A. Raese, their father, is the owner of 1 share of stock of that company; that the said father has the legal custody of said infants by virtue of a decree of the Circuit Court of Monongalia County, West Virginia, made 2-7-56; that the situs of their said shares of stock has at all times remained in West Virginia; that the certificates evidencing their existence have at all times remained in the custody of the registered owners in West Virginia; and that they have at all times since their births maintained their legal residence in Monongalia County, West Virginia;

(3) That Supply Company was organized as a West Virginia corporation in 1910, has its principal place of business and chief works at Cascade, in Preston County, West Virginia, owns real and personal property in Preston County, and is engaged in leasing real estate and doing business in Preston County; that Power Company was organized as a West Virginia corporation in 1923, operates electric and telephone distribution systems in Preston

County, West Virginia, and in certain adjoining areas of Monongalia County, West Virginia, operates an appliance store in Preston County, and has its principal place of business in that county; that it has 500 shares of common stock outstanding, of which Supply Company owns 497 shares and of which Agnes J. Reeves Greer owns 3 shares, and that these 497 shares constitute by far the most valuable assets of Supply Company.

(4) That Preston was organized by Jane G. Kelly under the laws of Delaware, is wholly controlled by her, and of which she is secretary and her husband, H. B. Kelly, is president; that it is not qualified or admitted to do business in West Virginia, owns no property in West Virginia, and that, though requested so to do, the Kellys have failed and refused to furnish plaintiffs with any worthwhile information as to the financial and business affairs of the Delaware corporation;

(5) That a study of the plan of reorganization has disclosed to the plaintiffs that, if it is carried out, Supply Company would be dissolved and liquidated and its shareholders would ultimately be issued stock in Preston, a Delaware corporation, in lieu of their holdings in Supply Company, a West Virginia corporation; that the plan of reorganization is a scheme grounded in the revenge and bitterness of Jane G. Kelly against her former husband, Richard A. Raese, and is designed to strengthen her position against the minority stockholders from exercising any effective voice in the management or control of Supply Company and its West Virginia subsidaries, with the ultimate aim of freezing out the minority stockholders and confiscating their share interests in the West Virginia companies, to their great financial loss and disadvantage; that certain dividends declared and payable by Supply Company on shares of stock of the minority stockholders therein have never been delivered to them and that they should have judgment against Supply Company for the amount of such dividends; and

(6) That the arbitrary, vindictive and wrongful conduct of the majority stockholder, Jane G. Kelly, and her husband and associates, in putting into effect the plan of reorganization was tantamount to a conversion of plaintiffs' shares in Supply Company and as a result thereof, they are entitled to have paid them in cash the present fair value of their stock in Supply Company, to be arrived at as the Court shall so direct, and if this is not to be done, then in the alternative, the Court decree and carry out, by appropriate procedure, a dissolution and liquidation of Supply Company in accordance with West Virginia Code 31-1-81.

The Complaint concludes with an appropriate prayer for relief against all defendants (other than defendant, Agnes J. Reeves Greer), the principal items of relief sought being briefly as follows:

(a) That Richard Greer Raese, John Reeves Raese, and Richard A. Raese be adjudged the owners of 400 shares, 350 shares, and 1 share, respectively, of Supply Company common capital stock;

(b) That they recover judgments against defendants (other than Agnes J. Reeves Greer), or some of them, including in particular Supply Company, for sum equivalent to the present fair value of their respective shares of Supply Company stock;

(c) That as an alternative, the Court decree a dissolution and liquidation of Supply Company and Power Company, pursuant to West Virginia Code 31-1-81, and that a receiver be appointed for that purpose;

(d) That appropriate injunctive relief be decreed them for the proper protection of their respective stock interests; and

(e) That they be awarded judgment against Supply Company for sums covering such dividends as have been declared and become payable on their shares of stock in

said company, but which have not been paid or delivered to them.

Personal service of process was had in the state court action as to Supply Company, Power Company, Preston,[2] and Agnes J. Reeves Greer, and they have all entered appearances therein, but defendants, Jane G. Kelly and H. B. Kelly, being non-residents of West Virginia, were proceeded against by Order of Publication under West Virginia Code 56-3-23, 56-3-24, and the provisions of Rule 4 (e) (1) of West Virginia Rules of Civil Procedure and they have, as yet, made no appearances.

After the commencement of the state suit, to-wit, on 1-2-64, Preston and Public Service,[3] as Delaware corporations, plaintiffs, filed an action in the nature of an interpleader against Richard Aubrey Raese; Jane Greer Kelly; Richard Greer Raese, minor; John Reeves Raese, minor; Supply Company; Power Company, and Telephone Company, as defendants, under 28 U.S.C., Secs. 1335, 1397 and 2361, and Rule 22 (2) of the Federal Rules of Civil Procedure, in the United States District Court for the Southern District of Florida, in which it is alleged that interpleader-plaintiffs are Delaware corporations with their principal offices in Wilmington, that state, and that interpleader-defendant, Richard Aubrey Raese, is a resident of Monongalia County, West Virginia; that interpleader-defendants, Jane Greer Kelly and the two infants are resi-

---

[2] Personal service was had on Preston by virtue of West Virginia Code 31-1-71, since it was a party to the reorganization agreement to be performed in West Virginia. This statute was applied and upheld in State v. Knapp, (W.Va.) 131 SE 2d 81.

[3] Public Service was not initially made a party to the state court action, apparently because it was not a party to the reorganization agreement and was not then admitted to do business in West Virginia. However, it was later so admitted and by an amendatory order of the state court of 3-24-64, it was brought in as a defendant and served through the State Auditor.

dents of Florida;[4] and that interpleader-defendants, Supply Company, Power Company, and Telephone Company are all West Virginia corporations with their principal offices in Preston County, West Virginia.

Process issued upon the Interpleader Complaint was effected upon defendants, Richard Aubrey Raese; Richard Greer Raese, minor; and John Reeves Raese, minor, in the state of West Virginia; upon defendants, Jane Greer Kelly, Supply Company, Power Company, and Telephone Company, in the state of Florida.[4a]

The Interpleader Complaint sets up as the property in controversy 3,034 shares of Preston and dividends paid by Supply Company in the sum of $2,253.00; that of the 3,034 shares of Preston, 3,030 or the cash value thereof are adversely claimed by both defendants, Jane Greer Kelly as trustee of the minors and Richard Aubrey Raese as their guardian; 4 shares or the cash value thereof are adversely claimed or threatened to be claimed by both defendants, Jane Greer Kelly and Richard Aubrey Raese, in their individual capacities; and that the dividends are adversely claimed or threatened to be claimed by both defendants, Jane Greer Kelly and Richard Aubrey Raese, in their indi-

---

[4] The infants vigorously deny that they are residents of Florida. They maintain that they have remained residents of West Virginia since their births and that their residence in West Virginia was judicially determined to be such by the Circuit Court of Monongalia County, West Virginia, in an habeas corpus action, on 12-6-55.

[4a] Service on these West Virginia corporations was made on Naomi Weaver, Asst. Sec., at 324 Royal Palm Way, Palm Beach, Florida. The record discloses that this was the address of Mrs. Kelly's Florida lawyer before the United States District Court there. Record indisputably establishes the principal offices and places of business of these corporations to be in West Virginia.

vidual and fiduciary capacities, and by Preston, as transferee of stock of Supply Company.[4b]

Preston, as one of the plaintiffs in the Interpleader Complaint, goes on to allege various and sundry tortuous acts and conducts on the part of Richard Aubrey Raese against it, Supply Company, Power Company, and Telephone Company, resulting in damages to it in the amount of $743,587.00, and praying that judgment be rendered by this court in its favor against the said Richard Aubrey Raese for said amount, together with cost and reasonable attorney fees.

The corporate defendants and defendant, Jane Greer Kelly, answered admitting all the allegations of the Bill of Interpleader. Additionally, Jane Greer Kelly, individually and as guardian and custodian of the minors, filed a Cross-Claim seeking a declaratory judgment pursuant to 28 U.S.C., Section 2201, as follows:

FIRST: Declaring that the effect of certain judgments rendered by the Eleventh Judicial Circuit Court of Florida on 2-19-57, 5-3-57, 2-19-60, and 12-28-60, completely and conclusively establishes her as the lawful custodian and guardian of the persons and the estates of the defendant minors;

SECOND: Declaring that the effect of said judgments of said Florida state court operates as a complete and conclusive bar against the assertion by defendant, Richard Aubrey Raese, of any right, title, claim, or interest as custodian and/or guardian of said defendant minors, in the properties or monies which are the subject matter of this cause;

[4b] Raeses make no adverse claim to these Preston shares, contending that they are the fruits of the illegal reorganization; that they are merely trying to protect their holdings in Supply Company, not desiring or seeking to acquire any shares in Preston.

THIRD: Declaring that she, as trustee of minors, is entitled to their stock certificates for their shares of stock in Preston, issued pursuant to the plan of reorganization;

FOURTH: Declaring that certificates of Preston issued to Richard Aubrey Raese, pursuant to said plan of reorganization, for 4 shares of stock therein, be held to satisfy any judgment entered for her against defendant, Richard Aubrey Raese; and

FIFTH: Demanding that judgment be entered for her against defendant, Richard Aubrey Raese, in the amount of $68,000.00, together with cost and reasonable attorney fees.

This Cross-Claim of defendant, Jane Greer Kelly, concludes with a demand for "trial by jury." The record before this Court does not indicate whether any process was ever issued thereon.

Such proceedings were had upon the Bill of Interpleader, the answers thereto, and Cross-Claim that a temporary restraining Order was issued by the Federal District Court of Florida against further prosecution of the state court suit in Preston County, West Virginia. Thereupon defendants, Richard Greer Raese and John Reeves Raese, infants, by Richard Aubrey Raese, their legal guardian, and Richard Aubrey Raese, individually, filed joint and several Motions in the Federal District Court of Florida to dismiss the Interpleader Complaint and dissolve the injunction, and in the alternative, to strike and transfer the proceedings to the United States District Court for the Northern District of West Virginia, assigning as grounds lack of jurisdiction of subject-matter, lack of jurisdiction over persons of interpleader-defendants, lack of proper venue, want of good faith on part of interpleader-plaintiffs, collusion on the part of interpleader-plaintiffs with Jane Greer Kelly and H. B. Kelly, unclean hands, lack of equity, and failure to state a claim upon which relief could be granted.

Hearings were had pursuant to this Motion and the Federal District Court of Florida on 3-5-64, dissolved the in-

junction and on an *ore tenus* motion of plaintiffs, granted them ten days from 3-2-64 within which to file an amended complaint. No amended complaint being filed, the Court by Order of 3-31-64, granted interpleader-defendants' Motion to transfer the proceedings to the United States District Court for the Northern District of West Virginia. If the Motion to dismiss is sustained, then all other matters involved in the Bill of Interpleader and the Cross-Claim become academic insofar as this Court is concerned.

This leads us to a divorce suit instituted by Jane G. Raese (now Kelly) against Richard A. Raese in the Eleventh Judicial Circuit Court of Florida, presided over by one George E. Holt, in which a decree of divorce was granted and a settlement of property and child custody was approved on 5-4-55. Under the decree and settlement agreement, the father was given the sole custody of the minor children with certain visitation rights to the mother. The mother was then maintaining, and has since maintained, her residence in Florida, and the father was then maintaining, and has since maintained, his residence in West Virginia. A few months later, the mother brought and prosecuted an habeas corpus proceeding against her ex-husband in the Circuit Court of Monongalia County, West Virginia, the object of which was to obtain custody of the children. The Circuit Court decided the case against her on 2-7-56 from which she sought and was refused an appeal by the West Virginia Supreme Court of Appeals.

Thereupon, the mother secured certain *ex parte* orders from Judge Holt of the Florida State Court, as follows:

2-19-57: Putting sole custody of minor children in mother, the father to have certain visitation rights to be determined by the Court;

5- 3-57: Requiring father to turn over all stocks and securities of minors including their stock in Preston County Supply Company to mother as their natural guardian and vesting in her all voting rights thereto or therein;

2-19-60: Directing secretary and treasurer of Preston County Supply Company to cancel on books of Supply Company all outstanding shares in names of minors and to re-issue such shares in the name of their mother as trustee for them; and

12-28-60: Directing (nunc pro tunc) that sole custody of minor children be with mother, with visitation rights of father to be determined by the Court.[4c]

From this background, it is readily seen that there is here involved a conflict in jurisdiction of two courts—Preston County Circuit Court of West Virginia and the United States District Court for the Northern District of West Virginia—the former having first obtained dominion over the case by reason of the suit brought therein on 12-5-63. The jurisdiction of the Federal court was not invoked until 1-2-64. Thus, it becomes pertinent to look to the relationship that each of these courts bears to the other in this controversy and to put such relationship in proper perspective under the facts and circumstances of this case. This is necessary in order to determine which court, if either, should yield to the other where, as here, jurisdiction for federal intervention is based solely on diversity of citizenship. Fortunately, the answer was given by Chief Justice Marshall in *Smith* v. *McIver*, 9 Wheat 352, 6 L.Ed. 152, as far back as 1824, in these words:

> "In all cases of concurrent jurisdiction, the court which first has possession of the subject-matter must determine it conclusively."

[4c] Legality of these orders is denied by the Raeses on the ground that they were not served with process; were not before the Florida Court; and that that court in the making of these orders had no jurisdiction over them or their shares in Supply Company.

With some modification, now and then as exigencies required, the fundamental concept of this rule has been adhered to by both state and federal courts with remarkable consistency. 14 Am. Jur. (Courts) Sec. 243, p. 435. In *Jackson* v. *Parkersburg & O. V. Electric Ry. Co.* (N.D. W.Va. 1916), 233 F. 784, where a conflict arose between the state court and the federal court over which had prior jurisdiction, Judge Dayton said:

> "Where suits are brought in courts of concurring jurisdiction involving a controversy between substanstially the same parties or their privies, and no seizures of the res is made, that court in which suit is first brought is entitled to exclusive jurisdiction."

The general rule is in accord. See 21 C.J.S. (Courts) Sec. 529, p. 808, where it is stated:

> "Where a state and a federal court have concurring jurisdiction over the same parties or privies and the same subject-matter, the tribunal where jurisdiction first attaches retains it exclusively, and will be left to determine the controversy and to fully perform and exhaust its jurisdiction and to decide every issue or question properly arising in the case."

And in *Local 333B United Marine Division* v. *Battle,* 101 F. Supp. 650, affirmed 72 S.Ct. 178, 342 U.S. 880, 96 L.Ed. 661, it was said:

> "Proper comity between state and federal courts also requires that a federal court should interfere with proceedings in a state court, even when federal court has that power, only upon a clear and convincing showing of the clear-cut necessity for the exercise of such power."

Therefore, it seems clear that where, as here, interpleader rests upon diversity alone, and where, as here, the substan-

tive rights of all parties are measured by state law, this Court should desist from interfering with the orderly processing of issues by the state court, unless there are substantial equitable considerations present dictating a contrary view. We find none here. To the contrary, it is clear that Preston and Public Service are the mere instruments of the Kellys. Everything in the record indubitably points to this. They were brought into being by the Kellys and are obviously subject to their every command and dictate. Thus, their actions, and the reasons and motives behind them, must, in reality, be taken and considered as the actions and motives of the Kellys. So viewed, the practical mind cannot help but conclude that there is no conflict in interest here between these companies and the Kellys. It was by the vote of Jane G. Kelly, as the controlling stockholder of Supply Company, that Preston emerged as the successor to Supply Company over the objection and protest of the latter's minority stockholders. Having thus become an accessory to the design by the Kelly's to effectuate the reorganization plan in disregard of the wishes of the minority stockholders, Preston and Public Service ought not in good conscience be permitted to now seek by way of interpleader, where equitable principles must be applied, the aid and protection of the Court from anticipated vexatious demands or litigation growing out of their own questionable conduct. Especially should this be so since Preston was made a party defendant to, and lawfully served with process in, the state court suit in Preston County. The very purpose and nature of that suit was to challenge the legality of the proposed reorganization and its consummation. This forewarning to Preston, as to its future actions and conduct, removes it from the realm of an innocent party.

Under such circumstances, these companies are hardly in position to ask a court of equity to relieve them from the untenable situation complained of. Nor does it appear that there exists any basis in fact for the apprehended fear by

Preston that it stands in danger of Jane G. Kelly with reference to the shares and dividends in question. Her dominant control of Preston renders this a most unlikely eventuality. As between Preston and Kelly, there is and can be no *real* fight, since they are for all practical purposes one and the same. The factual situation here in this regard is remarkably similar to that in *Bierman* v. *Marcus*, 246 F.2d 200 (3rd Cir. 1957), where a Bill in Interpleader was dismissed for lack of equity. There interpleader was sought by Bierman and Miller, who were the controlling stockholders of Milmar, Inc., on the theory that *their* corporation might assert against *them* a claim for the unpaid purchase price of its shares. The Court found that the apprehended fear of Bierman and Miller was not asserted in "good faith" and that there was no real danger of Milmar, Inc., which they controlled, involving them in any vexatious demands. Consequently, the Court concluded by saying that

> "Where the plaintiff knows that he can safely pay one party without substantial risk of vexatious demands by a rival claimant interpleader will not lie."

So it is here. There is present no real basis for Preston to fear its progenitor, Jane G. Kelly. Moreover, the very basis for vexation allegedly feared by the interpleader-plaintiffs flows directly from the consummation of the plan of reorganization over the protest of the minority stockholders, and whatever predicament, real or imaginary, they may now find themselves in with reference to the rival claimants to the shares and dividends in question, cannot be dissociated from the methods and procedures employed by them and the Kellys in effectuating the plan of reorganization.

Thus, it is clearly apparent to this Court that the *ex parte* court orders of Judge Holt, cancelling the share certificates of the infants in Supply Company and directing their reissue in the name of Jane G. Kelly, as trustee for them, were obtained by the Kellys in furtherance of their deter-

mination to get control of the voting rights of the infants' shares. This was evidently deemed necessary to circumvent the statute law of West Virginia (Code 31-1-81) relating to the rights of minority-dissenting stockholders. For there, it is specifically provided that where holders of one-fifth or more of the outstanding shares dissent from proposed action of the majority, the minority are entitled, in equity, to seek either payment in *cash* of the fair value of their shares or a decree of dissolution and liquidation.[5] The West Virginia Supreme Court of Appeals upheld this statute in *Hall* v. *McLuckey,* 134 W. Va. 595, 60 SE 2d 280; *Tierney* v. *United Pocahontas Coal Co.,* 85 W. Va. 545, 102 SE 249; and the Iowa Supreme Court applied it in *Otjes* v. *Bagley,* 217 Iowa 1200, 250 NW 17. The federal courts are bound by state statutes and state court decisions in such matters. *Hirsch* v. *Independent Steel Co.,* 4 Cir., 196 F. 104. *In Metcalf* v. *American School Furniture Co.,* 2 Cir., 122 F. 115, it was said:

> "Abundant authority exists for holding that, conceding the authority of a corporation to sell its property to another corporation, the stock in payment of such property cannot be forced upon dissenting stockholders."

This court can conceive of no injury resulting to either Preston or Jane G. Kelly by its declining to assume jurisdiction. To the contrary, it would appear that they should benefit from it. Both Preston and Kelly, being parties to the state court action, can therein undoubtedly set up their respective positions and grievances by proper pleadings and secure trial and final adjudication thereof. In that court, for example, under its general equity jurisdiction, Mrs. Kelly can have declaratory judgment as to the legal effect of the Holt orders. *Dolan* v. *Hartman,* 126 W. Va. 480, 29 SE 2d 8. It is seriously doubtful if she has a right

---

[5] The shareholdings of dissenting stockholders are equivalent to approximately 30% of Supply Company's outstanding shares.

to such relief in this court in interpleader, in view of the fact that there is a legal remedy available to her through the Federal Declaratory Judgment Act, 28 U.S.C., Ch. 151, Sec. 2201. See 48 C.J.S. (Interpleader) Sec. 8, p. 44, where the rule is

> "Interpleader is allowed only where it appears the remedy is necessary and that petitioner has no adequate remedy at law."

Moreover, there is available to her at the state level a Declaratory Judgment Act (Code 55-13-1) if she should have need to use it. Likewise, in the state court, the right of Preston to prosecute and have jury trial of its Cross-Claim for damages against Richard A. Raese, where personal service of process can be had on him, would seem to work to its advantage; whereas, whether such can be done in this court in an interpleader action is fraught with considerable uncertainty. *Liberty Oil Co.* v. *Condon Nat. Bk.*, 260 U.S. 235, 244, 67 L.Ed. 232; *Bynum* v. *Prudential Life Ins. Co.* (D.C. S.C.) 7 F.R.D. 585; 2 *Barron & Holtzoff*, Sec. 555, p. 138; *Liberty Nat. Life Inc. Co.* v. *Brown*, 119 F. Supp. 920 (M.D. Ala. 1954). Indeed, in the recent case of *Metropolitan Life Ins. Co.* v. *Enright*, (S.D. Calif. 1964) 231 F. Supp. 275, it was held that there is no jurisdiction in interpleader to grant judgment in personam as to subject-matter apart from that deposited in court, citing 48 C.J.S. (Interpleader), Sec. 47, p. 100, where the rule is stated:

> "The Court ordinarily should decree the rights of the parties only with respect to the particular fund or property which is the subject matter of the litigation."

Neither is the difference in the locale of the two courts of any significance since the seat of this court at Fairmont is less than thirty miles from the seat of the state court at Kingwood, where Preston's and Kelly's West Virginia counsel is located. Nor is there any showing in the record

suggesting in any way that the judge of the state court is biased or prejudiced for or against any party to the litigation or that he is not fully competent and qualified to hear all issues and render impartial justice with reasonable dispatch.

If, per chance, Preston and Public Service should deem it necessary to interplead in the state court to protect their interests, they will find there available to them for that purpose a rather comprehensive interpleader statute, West Virginia Code 56-10-1, and Rule 22 of West Virginia Rules of Civil Procedure, in all essential features, the same as Rule 22 of the Federal Rules of Civil Procedure.

As has been clearly seen, a resolution of the issues raised by the state suit and the interpleader action is dependent in no way upon any federal substantive law, and in that case the state substantive law must be applied to the issues whether they be tried here or in the state court. This is required by the holding in *Erie Ry. Co.* v. *Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, in these words:

> "There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' they be commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. * * * Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern."

Therefore, mindful that the orderly administration of justice requires that due respect be accorded the rule of comity between courts of concurrent jurisdiction, and finding in this record no salutary reason, in law or equity, to

depart therefrom, this court will accordingly exercise its discretion and desist from taking jurisdiction of the interpleader action. This recognition by this court of the prior jurisdiction and ability of the state court to hear and resolve all issues comports with reason and logic and is supported by respectable authority. *Kline* v. *Burke Construction Co.*, 260 U.S. 226, 43 S.Ct. 79, 82, 67 L.Ed. 226; and *Flanagan* v. *Marvel* (D. Minn. 1950), 94 F. Supp. 145. In the Flanagan case, where the Kline case is cited and relied upon, the rule is correctly stated thusly:

> "There is no possibility of the plaintiff herein, as executor, being subjected to any suit or claims in any other jurisdiction by any of these claimants. The state court can grant full and complete relief as between the claimants to the property in his hands. True, he is merely a stakeholder and there is merit to his position that these parties should settle their controversy without involving him in any protracted litigation. But the Minnesota interpleader statute, Section 544.12, should afford plaintiff ample opportunity for relief in that regard. There is, therefore, on this showing, an absence of any circumstances which, under the federal interpleader statute, to properly invoke any equity jurisdiction of this Court. In other words, the equitable basis for assuming jurisdiction under the interpleader statute is wanting."

Mutual Life Ins. Co. of New York v. *Egeline,* (D.C.) 30 F. Supp. 738, is also cited as authority in the Flanagan case, where it was said:

> "Where (the) hazard has been removed by reason of all the parties having been subjected to the jurisdiction of a court of competent jurisdiction before any proceedings have been instituted in the Federal Court, the purpose of the federal statute has been accomplished without the necessity of its application. While

the federal jurisdictional facts still exist in such case the equitable grounds do not."

The rule has been more recently recognized in *Prudential Insurance Co.* v. *Shawyer,* (W.D. Mo. 1962) 208 F. Supp. 464.

It is insisted by interpleader-plaintiffs that the Florida District Court, in ordering a transfer to this court, assumed jurisdiction and that this court should hear the interpleader upon its merits. The contention is without merit. The transfer order specifically recites that the transfer was made for "convenience of the parties" and there is nothing therein which could be construed as an attempt by that court to restrict this court in the free exercise of its discretion.

It should be understood by all parties that in reaching its decision to desist from assuming jurisdiction of the interpleader action and in giving its reasoning therefor, this court has made no attempt to pass upon the merits of the several claims asserted and, accordingly, neither the parties nor the state court of Preston County should draw any inferences as to the merits from what has been said herein. Where facts have been alluded to, it was done for the purpose only of demonstrating the absence of equitable considerations calling for this court to interpose its jurisdiction in a matter of purely local-state concern.

The record indicates considerable factual disagreement. Too, much animosity it evident. Each side questions the motives and integrity of the other. Only after full development of the facts may blame be assessed and this unfortunate litigation brought to an end. This court has full confidence in the wisdom and integrity of the state court to do justice between the parties.

Motion to dismiss interpleader action granted for reasons stated.